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June 20, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: GN Docket No. 93-252

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and four copies of the "Comments of the Bell Atlantic Copmanies" on the Commission's Further Notice of Proposed Rulemaking in this proceeding.

Should you have any questions with regard to this matter, please communicate with this office.

Very truly yours,

John T. Scott, III

Enclosures

cc: Ralph A. Haller
John Cimko, Jr.
David Furth
Nancy Boocker

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252 Further Notice
	)	
Regulatory Treatment of Mobile Services	)	

COMMENTS OF THE BELL ATLANTIC COMPANIES

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Dated: June 20, 1994

TABLE OF CONTENTS

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In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252 Further Notice
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COMMENTS OF THE BELL ATLANTIC COMPANIES

The Bell Atlantic Companies, by their attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submit comments on the Commission's Further Notice of Proposed Rulemaking in this proceeding (FCC 94-100, released May 20, 1994).

SUMMARY

These comments address three aspects of the Further Notice.

1. Bell Atlantic is concerned that the Further Notice is too narrowly focused on modifying the rules for private carriers now being reclassified as CMRS, and that it does not, as Congress has required, seek to achieve a consistent regulatory framework for all commercial mobile radio services (CMRS). Real symmetry demands not merely rewording Part 90 rules to be consistent with existing Part 22 rules, but also revising Part 22 to bring it in sync with the new regulatory approach adopted for PCS in Part 24. The Commission should in this proceeding review all of its mobile services rules to eradicate archaic and unjustified differences that handicap fair competition.

2. Bell Atlantic also believes that the "spectrum cap" concept the Further Notice advances is incorrectly aimed at imposing a duplicative layer of regulation on the CMRS industry generally. The Commission already has effective spectrum caps in place for two of the three services which are authorized to use the lion's share of CMRS spectrum, PCS and cellular. But it has none for the third such service, Specialized Mobile Radio. Since the Commission expects wide-area SMR to offer services comparable to PCS and cellular, it should adopt ownership limits for that service which parallel regulation of those other services. This narrower approach will promote parity, while deferring until a more appropriate time consideration of a general spectrum cap.

3. Bell Atlantic endorses the Commission's efforts to revise technical, operational and licensing rules for formerly private carriers being reclassified as offering CMRS. The proposals to revamp those rules which are set forth in the Further Notice are important to achieve a unified and consistent regulatory structure for CMRS. The final section of these comments addresses the Commission's proposals and recommends related changes.

I. THE COMMISSION SHOULD ENSURE SYMMETRY AMONG ALL OF ITS RULES GOVERNING CMRS IN THIS PROCEEDING.

This rulemaking is intended to implement Section 6002(d)(3) of the Omnibus Budget Reconciliation Act of 1993. That provision imposes four separate rulemaking obligations on the Commission, all of which are to be completed by August 10, 1994. Three of those obligations (subparagraphs (A), (B) and (D)) primarily

concern the "modification" of the private radio Part 90 rules applicable to reclassified private carriers into rules that are comparable to those for "substantially similar" common carrier services. Subparagraph 6002(d)(3)(C), however, imposes an independent, and broader, obligation on the Commission which is not confined to harmonizing the rules for CMRS Part 90 carriers with existing rules for common carriers. It directs that the Commission "shall issue such other regulations as are necessary to implement the amendments [to Sections 3(n) and 332]." That obligation, too, must be completed this August.

In defining the scope of the Further Notice, the Commission correctly acknowledges that Section 6002(d)(3) imposes two distinct obligations on it: (1) to revise the technical and operational rules for reclassified private services to ensure symmetry with mobile common carrier services; and (2) to adopt other rules as necessary to achieve regulatory symmetry. (¶ 5.) The proposed rule changes set forth in the Further Notice focus, however, only on the first obligation, and ignore the second. Thus, while the Commission makes major strides toward the necessary changes to its Part 90 rules, it leaves unaddressed other disparities in its rules -- disparities that undermine the ability of CMRS providers to compete on equal terms. The scope of this proceeding is thus too narrow. It must, under Section 6002(d)(3)(C), address not just its Part 90 rules but also the asymmetries in its existing rules for CMRS providers.

The most significant set of asymmetries concerns disparities between Part 22 licensees and the PCS service. The Commission

acknowledges "the potential competitive impact of PCS on existing mobile services," and asks for comments on how to conform its PCS and other mobile service rules. (Further Notice at ¶ 6). But it makes no proposals for doing so, in sharp contrast with its detailed proposals for specific changes to its Part 90 rules. Yet addressing PCS rule disparities is equally if not more important. Changes are essential given that many broadband PCS carriers will enjoy the use of spectrum blocks larger than cellular carriers, and even narrowband PCS carriers will have the unique opportunity to build national systems.

The problem is primarily one of timing, in that many of the Part 22 rules were adopted more than a decade ago, while the PCS rules are new. The evolution of competition in the mobile services industry, combined with the Commission's recognition that extensive regulation can be counterproductive, led it to take a more incremental approach toward PCS regulation than it had taken toward Part 22 services. In its various PCS orders, it reiterated its commitment to a "minimal" regulatory scheme which would set only "broad" and "flexible" rules.[1/] While Bell Atlantic supports that general approach, it has led to a situation where the Commission has different operational rules to regulate what it intends to be directly competitive services, Part 24 for PCS and Part 22 for cellular. Those differences undermine the goal of

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1/ See, e.g., Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144 (released June 13, 1994), at ¶¶ 6 and 159, reaffirming a "broad" approach to the definition of PCS and an approach toward operating rules which provides "maximum flexibility".

symmetry. Congress has explicitly directed the Commission to fix the discrepancies, and it should so in this proceeding.[2/]

The following examples illustrate the need for the Commission to address the many inconsistencies between the Part 22 and the PCS rules:

-- The Commission adopted a broad and flexible definition of the services which PCS carriers can provide. Section 24.10, "Permissible Communications," states that "PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only if ancillary to mobile communications." Cellular providers do not enjoy this freedom. In contrast to Section 24.10, the parallel Part 22 provision on "Permissible Communications," Section 22.911, contains numerous restrictions on the types of services cellular carriers can offer. In addition, Section 22.930 states, "The only fixed service cellular carriers may offer is basic exchange telecommunications radio service," and contains other requirements which do not apply to PCS. Moreover, the limited right to provide incidental fixed or other services is subject to restrictions which do not apply to PCS. Section 22.308. These rules should be revised, at this time, to bring them into harmony with the Commission's largely hands-off approach to the types of PCS services which PCS

2/ This is evident not only from the language of the Budget Act but from the deadlines Congress imposed. It grandfathered reclassified Part 90 licensees from the new CMRS rules for three years, Section 6002(c)(2)(B), but directed that the "parity" rulemakings be concluded within one year. Section 6002(d)(3). These dates make sense precisely because that rulemaking was to address not just reclassified private services, but parity among all CMRS services.

providers can offer. Cellular licensees should have the same flexibility to offer services to meet the needs of the public.

-- Cellular carriers are forbidden from offering dispatch services under Section 22.911, but PCS carriers are free to do so.[3/] There is no rational basis for that restriction under Part 22, and it should be eliminated in this proceeding to comply with Congress's mandate.

-- Part 22 licensees also must comply with numerous detailed rules concerning transmitter construction and operation (Section 22.908), maintenance of control points (22.909), and responsibility for operational control and maintenance of mobile stations (22.912). The Further Notice (¶ 83) notes that Part 90 contains similar operational rules as those in Part 22, and proposes to eliminate inconsistencies between the Part 22 and Part 90 rules. But it omits any reference to Part 24. In fact, the Commission has not adopted these provisions for the PCS service. Given that the Commission has decided that such detailed operational provisions are unnecessary for PCS, there is no reason why they should any longer be applied to competing mobile service carriers, and they should be eliminated.

There are significant other disparities in the rules for CMRS which the Commission should correct in this proceeding in order to comply with Section 6002(d)(3)(C).

3/ While the Commission has stated it would in the future take up the need for this provision, Second Report and Order, GN Docket No. 93-252, FCC 93-41, at ¶ 285, it has not yet done so. This is precisely the type of inconsistency which Congress directed should be taken up before August 1994.

-- Cellular carriers who are affiliates of telephone companies cannot acquire SMR systems (Section 90.603(c)), but other competing carriers can, and SMR licensees are not subject to this restriction.[4/]

-- BOC-affiliated cellular carriers are subject to the burden imposed by the cellular structural separations rule (Section 22.901), but their competitors are not, nor are BOC-affiliated PCS carriers. A BOC can operate its own PCS system, within its own telephone service area, unrestricted by the separations requirements of Section 22.901. Yet it cannot operate a cellular system, even outside of its own region, without establishing a separate cellular subsidiary and complying with the separations procedures and limits. This makes no sense, and needs to be corrected by deleting Section 22.901.[5/]

These critical disparities have hobbled the ability of certain cellular carriers to compete on equal terms. Meanwhile the Commission launched new and expanded services, including PCS and wide-area SMR for the purpose of competing with cellular, without extending the same rules to those services, or revising its cellular rules. Symmetry has by some measures deteriorated,

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4/ The Commission first proposed to repeal this restriction back in 1986 in PR Docket No. 86-3, but terminated that proceeding without action in 1992. Order, 7 FCC Rcd. 4398. The Further Notice (¶ 89 at n. 169) states that Section 90.603(c) "will be examined "in an upcoming proceeding," but deferring repeal of this rule, which arbitrarily prevents the entry of certain types of competitors into the SMR industry, does not comport with Congress' direction in the Budget Act.

5/ In its Second Report and Order in this docket, the Commission recognized that "the issue of regulatory symmetry in the application of these safeguards is an important one" (¶ 219), and committed to examine them. It should do so now.

not increased, and this rulemaking is the vehicle to arrest and reverse that trend.

It is, in short, an important part of discharging its mandate under Section 6002(d)(3) that the Commission not merely modify its Part 90 rules, but also reconcile these and other inconsistencies in all of its rules governing competing mobile services. Without that latter step, taken now, real symmetry will not be achieved.

II. THE SPECTRUM CAP PROPOSAL SHOULD BE LIMITED TO IMPOSING OWNERSHIP LIMITS ON WIDE-AREA SMR WHICH PARALLEL OTHER OWNERSHIP LIMITS FOR CMRS.

The Further Notice contains one proposal which is out of sync with the balance of the Commission's proposals. Part D proposes to impose a "CMRS spectrum cap" on common ownership of multiple CMRS facilities. The Commission bases this concept on concerns as to the potential anticompetitive effects which could result should particular entities amass more than some predetermined amount of mobile radio spectrum.

Bell Atlantic is concerned that the Commission's proposal for an overarching spectrum cap exceeds the identified purpose of this proceeding. The Further Notice clearly ties this rulemaking to the Commission's obligations under Section 6002(d)(3) of the Budget Act, which directs the Commission to harmonize the current, disparate rules affecting CMRS. As the Commission stated, this proceeding is on a fast track because Congress required these "transitional" rulemakings to be completed by August 1994. The concept of a generic spectrum cap is, however, not based on parity

but on the independent policy objective of fostering competition among CMRS services.

Taking up a generic, CMRS-wide spectrum cap now is unwise. It will detract both commenters and the Commission from the priority task in this proceeding, achieving a unified regulatory structure. It introduces enormously complex issues such as to how to measure market power, how to determine "markets" where service areas are not consistent, how to compare voice and non-voice services, and how to determine "how much spectrum is enough" among CMRS generally. The Commission will inevitably be slowed in achieving its parity objectives by having to address this issue. Adopting an overall "spectrum cap" now is also premature. By far the largest block of CMRS spectrum, for broadband PCS, is still months away from being licensed, and judicial appeals from the PCS rules may take even longer to resolve. The Commission should defer addressing the need for generic cross-CMRS caps until after the parity proceedings are completed.

One reclassified commercial mobile radio service, Specialized Mobile Service, however, is not subject to any spectrum aggregation limits or cross-ownership limits. (Further Notice at ¶ 89.) Although the Commission should not create a complex, overarching cap for CMRS as a whole in this proceeding, it does need to impose such limits on certain SMR providers. That narrower action will promote the primary goal of this rulemaking, regulatory symmetry for competing CMRS providers, while also advancing the fundamental objective of the spectrum cap proposal, preventing spectrum aggregation which threatens full competition.

The Commission has for years had aggregation rules in place for cellular carriers. It has now adopted aggregation rules for both narrowband and broadband PCS. And it has adopted cross-ownership rules which directly limit combinations of cellular and PCS licenses with overlapping service areas. What is notably missing are any parallel restrictions on SMR.

The Commission has repeatedly noted that wide-area SMR systems are competitive with both cellular and PCS, and has already determined that the record in this proceeding supports their classification as CMRS, precisely because of the need to ensure that they are subject to the same regulatory structure.[6/] It has taken numerous actions to permit SMR to compete as a full-fledged alternative to cellular, with greatly expanded licensing areas and significant additional spectrum (see Further Notice at ¶¶ 7, 11, 15). Yet the Commission has not adopted ownership and spectrum aggregation limits for this service. Worse, its rules actually impede competition in that industry, by imposing barriers to entry on certain entities who would otherwise seek to provide alternative service to subscribers.[7/]

6/ Second Report and Order, GN Docket No. 93-252, CC Docket No. 94-31 (released March 7, 1994), at ¶¶ 88-93. Large, well-financed companies such as Nextel, Motorola, MCI, CenCall and DialPage have announced plans to assemble and operate nationwide or regional networks of SMR systems which will give them has access to larger customer bases than competing cellular carriers. Some networks are operating and others are being constructed.

7/ A glaring example of the cross-ownership disparities is the prohibition on ownership of SMR systems by wireline telephone companies. Section 90.603(c). There is no reciprocal ownership interest prohibition, however, on SMR carriers.

Given that the Commission has consistently seen the need for both aggregation limits on cellular and PCS, there is no rational basis not to adopt parallel ownership limits on SMR now. Those limits would respond to the Further Notice's concerns about diversity among mobile service providers as well as Congress's direction to achieve regulatory symmetry among competing services.

The Commission can take a variety of actions to impose parallel spectrum aggregation and cross-ownership limits on the SMR service. For example:

-- It can prohibit any SMR carrier with authority to construct a wide-area system[8/] from having more than a 5%-20% minority interest in cellular or broadband PCS systems in overlapping service areas, which would parallel the restrictions on both PCS and cellular carriers which were just adopted.[9/] Since wide-area SMR operators are holding themselves out as competitive alternatives to cellular, symmetry demands that they be subject to the same cross-interest restrictions already imposed on cellular operators.

-- It could bar any wide-area SMR system from acquiring more than one 30-mhz PCS license in a market in which that entity has

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8/ The Commission has authorized several entities to provide wide-area service, usually pursuant to waiver of various Part 90 rules, e.g., Fleet Call, Inc., 6 FCC Rcd. 1533 (1991), and it has proposed significant revisions in those rules to permit the routine licensing of wide-area SMR systems. Notice of Proposed Rulemakings in PR Docket No. 93-144, 8 FCC Rcd. 3950 (1993) (800 mhz) and PR Docket No. 89-553, 8 FCC Rcd. 1469 (900 mhz). See Further Notice at ¶ 7, 15-16. The Further Notice refines these proposals.

9/ Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 91-144 (June 13, 1994).

an SMR license to operate. There is no reason why an SMR license should be able to add two PCS licenses to its existing wide-area authorization, which is already designed as a competitor to both cellular and PCS.

-- The Commission could impose a cap of 40 mhz which can be held by any SMR entity, counting all interests in SMR, PCS or cellular, where those services overlap. Cellular licensees are limited to 25 mhz today, will be able to bid for an additional 10 mhz for a single PCS license, and ultimately may be able to seek 5 mhz more for a total of 40 mhz. PCS licensees will be capped at 40 mhz. But an SMR licensee is at this time free to acquire 40 mhz of cellular or PCS spectrum in addition to whatever spectrum it enjoys under Part 90. That spectrum is significant, approaching the amount a cellular carrier is licensed to use.[10/] This approach will leave small SMR operators with ample flexibility to expand their systems, while ensuring that wide-area SMR operators do not acquire more spectrum than competing services may obtain.

Other alternatives may be suggested by other commenters, and Bell Atlantic will address them in its reply comments. The basic point is that currently, the SMR service is uniquely unrestricted. The complete absence of limits on spectrum aggregation of wide-area SMR service with other services not only violates Congress's directive to the Commission to achieve symmetry among competing mobile services, but violates the Commission's long-stated objectives of encouraging competition among those services.

10/ The Further Notice states that at least 19 mhz is currently licensed to the SMR services, 14 in the 800 band and 5 mhz in the 900 mhz band.

III. THE COMMISSION'S PROPOSALS TO HARMONIZE THE PART 90 RULES WITH THE RULES FOR EXISTING CMRS SERVICES SHOULD BE ADOPTED.

Parts C and E of the Further Notice deal seriatum with a variety of technical, operational and licensing rules which currently apply to Part 90 services. The Commission correctly recognizes that Section 332 of the Act obligates it to bring its Part 90 rules into sync with the existing rules for mobile service providers. Bell Atlantic supports these proposals.

Equal Employment Opportunities (¶ 84). Bell Atlantic endorses extending the EEO rules and policies, which currently apply to Part 22 providers, to all reclassified Part 90 licensees. Regulatory symmetry makes adoption of identical EEO rules for PCS providers self-evident. The Further Notice asks whether the current exemption for carriers having less than 16 employees provides sufficient "flexibility" for certain carriers. There is no basis for changing that exemption based merely on the type of carrier. If the record provides a basis for revising it, however, any change should apply to all CMRS carriers.[11/]

Application Forms and Qualifying Information (¶¶ 108-114): Bell Atlantic endorses the proposed single application form for all mobile radio services. Substituting one form for the current hodgepodge of different forms and filing requirements will ease

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11/ In this connection, the new Part 24 rules for PCS carriers do not appear to contain an EEO rule which parallels Section 22.308. Since there is no basis to distinguish among types of CMRS service with regard to EEO, this obligation should be explicitly added to Part 24.

the administrative burdens on the Commission and on licensees who operate stations in multiple mobile services.

Paragraphs 113-114 of the Further Notice, however, create an ambiguity which the Commission should resolve. They state that Part 22 applicants must currently disclose whether they "or any controlling party" have had FCC licenses revoked or have engaged in other types of misconduct, and propose to extend that disclosure requirement to Part 90 CMRS applicants. However, current Form 401 and Section 22.13, which apply to Part 22 applicants, apply to "any party" to an application, not just controlling parties, and "any party" has been broadly defined to reach a variety of individuals and entities including stockholders, officers, directors, partners, subsidiaries, and affiliates of the applicant as well as a parent of the applicant. Moreover, proposed Form 600 continues to use the "any party" language.

The Commission is correct to propose that disclosure be limited to the applicant or a controlling party. The current rules call for information to be disclosed about individuals or entities with only a tenuous relationship to the applicant and no control over day-to-day operation of the system. The Commission should take this opportunity to clarify that the disclosure requirements apply only to the applicant or a party which is in control of that applicant.

In addition, the Further Notice does not address the related problem that Section 22.13(a)(1) requires a Part 22 applicant to identify a large class of individuals and entities in the

application, a burden which is not currently imposed on Part 90 applicants. Although this rule is intended to identify "real parties in interest," it goes far beyond that purpose by requiring applicants to disclose a multitude of distantly related individuals and entities with insignificant interests in the applicant. This information is not used by the Commission for any purpose, but it puts a significant burden on applicants. As long as the applicant and any "controlling" parties are disclosed, the Commission's information needs are satisfied. The Commission should thus revise Section 22.13, and should also revise the parallel provision for PCS applicants, Section 24.13.

Application and User Fees (¶¶ 115-16). The Further Notice proposes that Part 90 CMRS applicants and licensees pay the same application fees and user fees as existing CMRS applicants. Regulatory symmetry compels adoption of this proposal. To the extent that Part 90 applicants believe that an application fee would impose a particular hardship, the Commission's rules already allow for requests for waiver from the fees (see Section 1.1115).

Public Notice Procedures (¶¶ 117-18): Again, regulatory symmetry, as well as Section 309(d) of the Act, commands that reclassified Part 90 carriers be subject to the public notice provisions for applications for new stations and for license assignments or transfers of control. Since reclassified Part 90 carriers are by definition offering service to the public, the public must have an opportunity to learn of and comment on

applications involving those carriers. The Commission's specific proposals here are warranted and should be adopted.

CONCLUSION

For the reasons set forth above, Bell Atlantic supports the Commission's efforts in this proceeding to achieve regulatory symmetry between existing CMRS and reclassified private services. It urges the Commission also to address the regulatory disparities within existing CMRS services. That additional action is essential to meet Congress's mandate. Finally, the Commission should not at this time adopt an overarching, CMRS-wide spectrum cap, but defer that issue until this rulemaking can be completed. Instead, to achieve parity, it should adopt spectrum aggregation and cross-ownership limits for wide-area SMR service which parallel its existing rules for cellular and PCS services.

Respectfully submitted,

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